

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
KSTC-TV, LLC)	
)	CSR-7175-S
Request for Significantly Viewed Status)	

ORDER ON RECONSIDERATION

Adopted: June 23, 2010

Released: June 24, 2010

By the Associate Chief, Media Bureau:

I. INTRODUCTION

1. KSTC-TV, LLC, licensee of independent station KSTC-TV, Minneapolis-St. Paul, Minnesota, Channel 45 (“KSTC-TV”), has filed a petition for reconsideration of the Bureau’s decision denying its waiver request to use county wide, rather than community specific, audience survey data to establish its significantly viewed status in the four counties that comprise the Mankato, Minnesota DMA – Blue Earth, Brown, Watonwan, and Martin, Minnesota.¹ In the alternative, KSTC-TV subsequently filed an associated pleading containing community specific audience survey data which it maintains establishes its significantly viewed status in the subject communities. A station with significantly viewed status has greater carriage rights in certain instances in a subject community.² United Communications Corporation, licensee of station KEYC-TV, Mankato, Minnesota (“KEYC-TV”), opposed both KSTC-TV’s petition for reconsideration and its supplement to which KSTC-TV replied. For the reasons discussed below, we deny KSTC-TV’s petition for reconsideration.

II. BACKGROUND

2. In 1972, in Appendix B to the *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order*, the Commission established a list of significantly viewed stations based on surveys for the periods May 1970, November 1970, and February/March 1971.³ Section 76.54(d) of the Commission’s rules allows television broadcast stations not encompassed by the surveys (*i.e.*, not on-the-air at the time the surveys were taken) to demonstrate “significantly viewed status on a county-wide basis by independent professional audience surveys which cover three separate, consecutive four-week periods” during the first three years of the station’s operation which are comparable to the

¹See *KSTC-TV, LLC*, 22 FCC Rcd 12939 (2007) (“Bureau Order”).

²See 47 C.F.R. § 76.92(f).

³36 FCC 2d 326 (1972).

surveys used in compiling Appendix B.⁴ The Commission's rules allow stations like KSTC-TV, who cannot make a significantly viewed showing based on their first three years of operation to establish such on a community specific basis, pursuant to Section 76.54(b) of the rules.⁵ KSTC-TV sought a waiver to use county, rather than community data, despite not being able to meet the county wide showing requirements in their first three years of operation. Section 76.54(b) requires that surveys must be performed by an independent professional audience survey organization of

over-the-air television homes covering at least two weekly periods separated by at least thirty (30) days, but no more than one of which shall be a week between the months of April and September. If two surveys are taken, they shall include samples sufficient to assure that the combined surveys result in an average figure at least one standard error above the required viewing level. If surveys are taken for more than 2-weekly periods in any 12 months, all such surveys must result in an average figure at least one standard error above the required viewing level. If a cable television system serves more than one community, a single survey may be taken, provided that the sample includes non-cable television homes from each community that are proportional to the population.⁶

Section 76.5(i) of the Commission's rules requires that independent stations, such as KSTC-TV, achieve a share of total viewing hours of at least 2 percent and a net weekly circulation share of 5 percent in order to be declared significantly viewed.⁷ For network stations, the shares are 3 percent of total viewing hours and a net weekly circulation of 25 percent.⁸

3. In support of its petition for reconsideration, KSTC-TV maintains that the Bureau failed to adequately consider KSTC-TV's public interest arguments in denying its waiver to use county wide viewership data rather than community specific data, as required by Section 76.54(b) of the Commission's rules.⁹ Granting it a waiver to use county-wide viewership data, KSTC-TV contends, would return important Mankato-local and Minnesota-regional programming to the Mankato market.¹⁰ In the alternative, if the Bureau denies its petition for reconsideration of its waiver request, KSTC-TV has submitted community specific audience viewership data that it maintains establishes its significantly

⁴47 C.F.R. § 76.54(d). If a station can demonstrate that it has had a significant technical upgrade of its facilities at a later date, it may then use data for the three years following the upgrade. In order to make such a demonstration, the station must file a petition for special relief seeking a waiver of the rules, along with its request for significantly viewed status, to request status as "new" for significantly viewed purposes in order to use data outside of its original three-year period. Such waiver must be supported by engineering information that confirms the upgrade and must be accompanied by a filing fee.

⁵47 C.F.R. § 76.54(b).

⁶*Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Implementation of Section 340 of the Communications Act*, MB Docket No. 05-49, Report and Order, 20 FCC Rcd 17278 (2005) ("SHVERA Significantly Viewed Report and Order").

⁷47 C.F.R. § 76.5(i).

⁸*Id.*

⁹Reconsideration at 2; *see also* 47 C.F.R. § 76.54(b).

¹⁰Reconsideration at 2.

viewed status in the subject communities.¹¹ KSTC-TV maintains that the *Bureau Order* specifically granted it authority to submit this new showing.¹²

4. In its opposition, KEYC-TV maintains that KSTC-TV has once again failed to show why a waiver is warranted to use county-wide audience data.¹³ KEYC-TV maintains that, apart from submitting eleven letters from local parties in support of its petition, KSTC-TV has failed to show that a waiver to deviate from long established Commission requirements is warranted.¹⁴ KEYC-TV also disputes the validity of KSTC-TV's community specific survey data.¹⁵ Finally, KEYC-TV disputes KSTC-TV's assertion that the *Bureau Order* invited it to submit community specific data in support of its current request for significantly viewed status.¹⁶

5. In a supplement to its petition for reconsideration, KSTC-TV submitted the following community specific audience survey data, pursuant to Section 76.54(b) of the rules, to demonstrate that it should be considered significantly viewed in the communities of Mankato and St. James, Minnesota.¹⁷ The submitted information is as follows:

TABLE 1 – KSTC-TV VIEWING IN MANKATO, MN

<u>Survey Year</u> ¹⁸	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
May 2006 (week 2)	4	4.4124	4.013	50	29.45
Feb. 2007 (week 3)	2	9.901	1.667	37.03	46.64

¹¹ Supplement at 1-2.

¹² Reconsideration at 1.

¹³ Opposition to Reconsideration at 2. The *Bureau Order* noted that KSTC-TV failed to provide any information substantiating a technical upgrade that would qualify KSTC-TV to rely on county wide data. See *KSTC-TV, LLC*, 22 FCC Rcd at 12942.

¹⁴ Opposition to Reconsideration at 3.

¹⁵ Opposition to Supplement at 2-3.

¹⁶ Opposition to Reconsideration at 3.

¹⁷ Supplement at Attachment 1.

¹⁸ The survey dates provided meet the criteria set forth in the rules and *KSTC-TV* that the two one-week surveys be separated by at least 30 days and that both surveys may not occur between April and September.

TABLE 2 – KSTC-TV VIEWING IN ST. JAMES, MN

<u>Survey Year</u>	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
May 2006 (week 1)	3	4.4180	3.516	100	0.00
Feb. 2007 (week 2)	2	13.879	4.001	71.42	40.83

6. In opposition to the supplemental audience survey data provided by KSTC-TV, KEYC-TV points out that there was no notice to interested parties that KSTC-TV was planning to conduct surveys in Mankato and St. James.¹⁹ Moreover, KEYC-TV states that the data that KSTC-TV did supply appears to be a survey in which two to four diaries per week in self-selected weeks were obtained and used to support a claim of significantly viewed status.²⁰ While Nielsen did have diaries out in the four weeks of each “sweeps” period in 2006, KEYC-TV asserts that KSTC-TV did not supply the results of those surveys.²¹ Instead, KSTC-TV apparently chose favorable weeks where tiny samples produced anomalous results.²² Further, while KSTC-TV complains that the Mankato market is small and rural, KEYC-TV states that it has a population of over 32,000, not counting adjacent North Mankato and St. James.²³ KEYC-TV argues that within that population there should surely be more than two non-cable, non-ADS households from which a survey of off-air viewing could have been conducted if KSTC-TV was interested in getting statistically valid results.²⁴ KEYC-TV states that it should be noted that KSTC-TV is carried on a translator located in St. James. Given the enormous distance between KSTC-TV’s Grade B contour and St. James, KEYC-TV maintains that it is obvious that the viewing reported by the in-tab diaries in St. James was viewing from the translator and not off-air viewing of KSTC-TV’s primary signal.²⁵ KEYC-TV points out, however, that KSTC-TV has not made any attempt to demonstrate that viewing of translator signals provides a proper basis for significantly viewed status.²⁶

7. In reply, KSTC-TV argues that KEYC-TV raises flimsy procedural objections and fails to provide any valid reason to deny the petition for reconsideration.²⁷ KSTC-TV states that when the *Bureau Order* denied its request to be considered significantly viewed throughout the Mankato DMA, it

¹⁹Opposition to Supplement at 3.

²⁰*Id.*

²¹*Id.*

²²*Id.*

²³*Id.* at 4.

²⁴*Id.*

²⁵*Id.*

²⁶*Id.* Further, we note that this audience data reflects audience statistics gathered prior to the station’s conversion to a digital format.

²⁷Reply at 1.

also stated that KSTC-TV must provide community-specific data and invited KSTC-TV to do so.²⁸ In keeping with the terms of the *Bureau Order*, KSTC-TV states that it provided community-specific data obtained from Nielsen Media Research which categorically demonstrates that KSTC-TV should be considered to be significantly viewed in the communities of Mankato and St. James.²⁹ KSTC-TV argues further that, despite KEYC-TV's contention that there was no notice regarding viewership surveys, all interested parties, including KEYC-TV, have been on notice since January 2007 regarding KSTC-TV's decision to seek significantly viewed status.³⁰ At the direction of the *Bureau Order*, KSTC-TV states that it merely narrowed the focus of its request and the data supporting it. Moreover, KSTC-TV points out that in its petition for reconsideration it stated that it would supplement the record with community-specific data and KEYC-TV had ample notice of this submission and time in which to respond.³¹ KSTC-TV states that KEYC-TV's argument that the Nielsen data is unreliable is also unfounded and unsupported by any Commission rule or precedent.³²

III. DISCUSSION

8. While the *Bureau Order* did not specifically rule on whether KSTC-TV could submit supplemental audience survey data in the course of this proceeding, we see no public interest reason not to consider such information, especially since the parties have had a full opportunity to comment on the data's validity. We also note that in numerous past cases petitioners have submitted revised data on reconsideration which we have considered when the original showing failed to meet our criteria.³³ Further, while it is true that KSTC-TV should have notified interested parties, and most particularly KEYC-TV, prior to the compilation of its revised community-specific data, the need for such data was fully discussed in the *Bureau Order* so KEYC-TV was not unaware that such surveys might be conducted. In addition, KEYC-TV has had an opportunity to fully challenge KSTC-TV's survey results in this proceeding. We see no need to reject KSTC-TV's survey data based on this omission.

9. With regard to the community specific survey data submitted herein, we find that the data provided by KSTC-TV fails to support its petition. Section 76.54(b) of the Commission's rules states that significantly viewed status "may be demonstrated by an independent professional audience survey of over-the-air television homes that covers at least two weekly periods separated by at least 30 days but no more than one of which shall be a week between the months of April and September. If two surveys are taken, they shall include samples sufficient to assure that the combined surveys result in an average figure at least one standard error above the required viewing level."³⁴ KSTC-TV submitted data and methodology provided by Nielsen Media Research for the communities of Mankato and St. James based

²⁸*Id.* at 1-2, citing *KSTC-TV, LLC*, 22 FCC Rcd at 12943.

²⁹*Id.* at 2.

³⁰*Id.*

³¹*Id.* Indeed, KSTC-TV states that KEYC-TV even requested an extension of time to respond to petition for reconsideration, well before the supplement was received.

³²*Id.* at 3.

³³See e.g., *Benedek License Corporation*, 17 FCC Rcd 19167 (2002), *recon. granted*, 18 FCC Rcd 285 (2003); *Virginia Broadcasting Corp.*, 21 FCC Rcd 3462 (2006), *recon. granted in part*, 22 FCC Rcd 18109 (2007); *Gulf-California Broadcast Company*, 23 FCC Rcd 7406 (2008), *recon. granted*, 24 FCC Rcd 2738 (2009); *Gulf-California Broadcast Company*, 23 FCC Rcd 7400 (2008), *recon. granted in part*, 24 FCC Rcd 2747 (2009).

³⁴See 47 C.F.R. § 76.54(b).

on community-specific retabulations of Nielsen audience data for the May 2006 and February 2007 audience sweeps periods.³⁵ An independent station, such as KSTC-TV, must demonstrate that it attains at least a 2 percent share of total weekly viewing hours and a 5 percent net weekly circulation share in order to be considered significantly viewed in a community.³⁶ However, in this instance, when the standard errors are subtracted from the reported audience shares, KSTC-TV does not meet the criteria for significantly viewed status for an independent station.³⁷ By adding or subtracting the standard errors from the reported results, we create an interval estimate of the actual viewing which allows us to be approximately 70 percent sure that the true viewing level would be in that range, permitting us to determine whether the significant viewing criteria would be met if all households had been surveyed rather than measuring only the viewing patterns of a sample. In the case herein, we are interested in the lower point rather than the higher point on the interval in order to be sure that the reported result is actually above the criteria set forth in the rules, once the standard errors are considered.³⁸

10. For the community of Mankato, the results for the first survey period of May 2006 indicates that KSTC-TV attained a 0.339 percent share of total viewing hours (4.412 reported share – 4.013 standard error) and a 20.55 percent net weekly circulation share (50 reported share – 29.45 standard error). For the second survey period of February 2007, KSTC-TV attained a 8.234 percent share of total viewing hours (9.901 reported share – 1.667 standard error) and a less than zero percent (-9.61 percent) net weekly circulation share (37.03 reported share – 46.64 standard error). For the first survey period, KSTC-TV does not meet the significantly viewed criteria because the share of total viewing hours, once the standard error is factored in, is less than the required 2 percent minimum and both the total viewing hours and the net weekly circulation must meet or exceed the criteria. Similarly, for the second survey period, KSTC-TV is not significantly viewed because the net weekly circulation share is less than the specified criteria of 5 percent. Thus, for the community of Mankato, KSTC-TV has not demonstrated that it is significantly viewed.

11. For the community of St. James, the results for the first survey period of May 2006 indicates that KSTC-TV attained a 0.902 percent share of total viewing hours (4.418 reported share – 3.516 standard error) and a 100 percent net weekly circulation share (100 reported share – 0 standard error). For the second survey period of February 2007, KSTC-TV attained a 9.878 percent share of total viewing hours (13.879 reported share – 4.001 standard error) and a 30.59 percent net weekly circulation share (71.42 reported share – 40.83 standard error). For the first survey period, KSTC-TV does not meet the significantly viewed criteria because the share of total viewing hours, once the standard error is factored in, is less than the required 2 percent minimum and both the total viewing hours and net weekly

³⁵The use of an audience sweeps period is equivalent to the one-week period set forth in Section 76.54(b) of the rules.

³⁶See 47 C.F.R. § 76.5(i).

³⁷Unlike petitions seeking a waiver to prove that a station is no longer significantly viewed for network nonduplication or syndicated exclusivity purposes as in *KSTV-TV*, we subtract the standard error from the reported results for stations seeking significantly viewed status in order to ensure that there is a reasonable probability that the reported result at least meets the criteria for significantly view status. See e.g., *Cypress Broadcasting Corporation*, 11 FCC Rcd 21073 (1996); *Frederick Cablevision, Inc.*, *Middletown, Maryland*, 62 FCC Rcd 2d 967 (1977).

³⁸For waivers of the significantly viewed exception, we look “at the other side of the coin.” We add the standard error to the reported result to be sure that the audience statistic is below the criteria once the standard error is considered in order to be reasonably sure that the actual result is below the requirement and the station is no longer significantly viewed.

circulation must meet or exceed the criteria. For the second survey period, both audience statistics exceed the significantly viewed criteria, however, because Section 76.54(b) requires that significantly viewed status must be demonstrated for two weeks, these data do not demonstrate that KSTC-TV is significantly viewed in St. James.

12. We note further that, along with the data provided, KSTC-TV includes the standard Nielsen letter describing its methodology. Specifically, Nielsen's letter states that the attached report "provides audience net weekly circulation (cume) and share information among non-cable/non-ADS households for KSTC during the Nielsen Station Index (NSI) survey conducted over four week periods during the May 2006 and February 2007 measurements." However, the chart showing the data appears to be inconsistent with the description of the data provided by Nielsen. Nielsen states that it is providing sweep data – *i.e.*, four weeks of data – but the attached results are labeled by week number (as shown in the tables in paragraph 6 above. This gives the impression that only one week's worth of data from each sweep period is included. Indeed, even KEYC-TV noted that Nielsen had diaries in four weeks of each "sweeps" period, but that KSTC-TV had not supplied those results, apparently only choosing the favorable weeks.³⁹ Moreover, KEYC-TV argues that the Commission should not consider such small samples – between two and four diaries – sufficiently reliable to demonstrate that KSTC-TV is significantly viewed in Mankato and St. James. KSTC-TV's only explanation is that Nielsen provided the data and placed its name on it, but KSTC-TV fails to point to any provision of the rules to support its claim that the data are credible and meets the standards set forth in Section 76.54(b).⁴⁰

13. Although not necessary to our decision because the Nielsen results submitted by KSTC-TV clearly fail to satisfy the criteria set forth in Section 76.54(b), we note that while it is permissible to submit the results of two one-week surveys to demonstrate significantly viewed status under Section 76.54(b) of the rules, the way the data is presented here make the results appear suspect. It appears that Nielsen may have provided individual week audience statistics to the petitioner and KSTC-TV then picked the results that it thought would make the appropriate showing and did not provide the combined four-week sweep results described in Nielsen's letter. Accordingly, KSTC-TV's showing, even if it had met the Commission's criteria, would be in question, particularly given the discrepancy between Nielsen's description and the presentation of the audience survey statistics. We therefore concur with KEYC-TV with respect to the sample choice of only one unspecified week out of the entire sweep period. With respect to the sample size, generally we give much leeway to the size of the sample, recognizing that the standard error takes it into account when the variability of the estimate is calculated. However, it should be noted that due to the small samples in Nielsen's database for each week, most petitioners in similar cases tend to submit the entire four-week audience sweep results in lieu of the one-week results required in the rules, thus allowing for a larger, more reliable sample and generally smaller standard errors. In this case, it is clear that the small sample produces an unreliable result given how large the standard errors are relative to the reported results, including one situation where the standard error exceeds that of the reported audience statistic. Even if we ignore these very small sample sizes, however, KSTC-TV is unable to demonstrate that it is significantly viewed in these two communities.

14. Finally, we decline to grant KSTC-TV's alternative waiver request and grant it significantly viewed status using county-wide data based on eleven letters of support appended to its petition for reconsideration by entities interested in the station's programming.⁴¹ KSTC-TV claims that

³⁹See Opposition to Supplement at 3.

⁴⁰See Reply to Opposition to Supplement at 3.

⁴¹See Reconsideration at 3.

this was an issue which was not thoroughly discussed in the *Bureau Order* despite the fact that it submitted four letters of support in its original request.⁴² Section 76.54 of the Commission's rules is clear, both in the type of viewership data required – community-specific and county-wide data – and the circumstances in which such data can be used.⁴³ The submission by KSTC-TV of eleven letters in support of its petition based on the desire to view KSTC-TV's programming simply does not meet the high burden necessary for waiver of our rules. Short of a rulemaking to change the criteria established in Section 76.54 of the Commission's rules to seek significantly viewed status, KSTC-TV is not eligible to use county-wide data. Lastly, we note that even if we were to grant its waiver request, the *Bureau Order* found that the county wide data originally submitted by KSTC-TV was deficient to establish significantly viewed status. KSTC-TV has failed to introduce any subsequent information curing the deficiencies noted.

15. Accordingly, we find that the submitted audience surveys are insufficient to show that KSTC-TV is significantly viewed in the communities of Mankato and St. James, Minnesota, and we deny KSTC-TV's petition for reconsideration.

IV. ORDERING CLAUSES

16. According, **IT IS ORDERED**, that the petition for reconsideration filed by KSTC-TV, LLC **IS DENIED**.

17. This action is taken pursuant to authority delegated under Sections 0.283 and 1.106 of the Commission's rules.⁴⁴

FEDERAL COMMUNICATIONS COMMISSION

Eloise Gore, Associate Chief
Media Bureau

⁴²See *KSTC-TV, LLC*, 11 FCC Rcd 12939 at n.2.

⁴³See 47 C.F.R. § 76.54.

⁴⁴47 C.F.R. §§ 0.283 and 1.106.